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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 400

CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, and EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION,
Appellants,

vs.

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia.

BRIEF ON BEHALF OF APPELLANTS

KOONTZ & KOONTZ, J. CAMPBELL PALMER, III,
Counsel for Appellants.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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CHARLESTON FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, and EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION, *Appellants,*

vs.

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia.

BRIEF ON BEHALF OF APPELLANTS

OPINIONS BELOW

The opinion of the Circuit Court of Appeals of West Virginia is reported in 126 West Virginia ___, 30 S. E. (2d) 513, and is contained in the printed Statement as to Jurisdiction, pages 35-50.[1] The opinion of the Circuit Court of Kanawha County is found at S. J. 32-35. The opinion of the County Court of Kanawha County, West Virginia, ex officio Board of Review and Equalization, is found at S. J. 26-29.

[1](This Statement as to Jurisdiction was not reprinted, but is in the same printed form as it was for jurisdictional purposes, and is hereinafter referred to as S. J. .....)

JURISDICTION

The jurisdiction of this Court rests upon Section 237(a) of the Judicial Code, 28 U. S. C. A., Section 344(a).

STATUTES INVOLVED[2]

Chapter 11, Article 3, Section 14(a), Michie's Code of West Virginia, 1941, as amended by Chapter 118, Acts of the Legislature of West Virginia of 1939.

Chapter 11, Article 3, Section 1, Michie's Code of West Virginia, 1941.

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 1, of the Constitution of the State of West Virginia.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

ADMINISTRATIVE ORDER INVOLVED

There is involved an administrative order of the appellee, George P. Alderson, State Tax Commissioner, of West Virginia, issued to the Assessor of Kanawha County, West Virginia, and others, and it is found in the record printed for use in the Supreme Court of Appeals of West Virginia, pages 276-277.[3]

STATEMENT OF THE CASE

In 1932, the people of the State of West Virginia voted to, and did, ratify an amendment to the Constitution of West Virginia, which is now Section 1 of Article X, under the heading "Taxation and Finance," and which is

[2](The statutes, constitutional provisions and administrative order involved herein are set out in full in the Appendix hereto, Part I.)

[3](The record printed for use in the Supreme Court of Appeals of West Virginia is being used in this Court to save reprinting, and is hereinafter referred to as R. .....)

popularly known as the "Tax Limitation Amendment." (See Appendix for full section.)

In substance, that section provides that but for the exceptions therein contained "taxation shall be *equal and uniform* throughout the state" and "no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Then the section provides for dividing all property in West Virginia into four classifications, and the amendment further places an absolute maximum amount of taxation for each of the four classifications, and the various classes of property contained in each such classification.

The instant case is primarily concerned with property embraced within the provisions of Class I, which comprises "personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property," the maximum tax limitation being fifty cents on each one hundred dollars of value thereof. The second classification is residential property owned, used and occupied by the owner thereof exclusively for residential purposes, and farms occupied and cultivated by their owners, or bona fide tenants, and has a maximum tax limitation of one dollar per one hundred dollars. The third classification is all other property situated outside of municipalities with the limitation of one dollar and fifty cents per one hundred dollar value; and the fourth class is all such other property situated within municipalities, the limitation being two dollars.

Prior to 1939, no tax on building and loan associations, as such, was assessed or levied in West Virginia, but the stockholders of such associations were individually as-

sessed and taxed for such stock ownership. (See *Ohio Valley Building & Loan Ass'n* v. *County Court of Cabell County*, 42 W. Va. 818, 26 S. E. 203.) There was no requirement by the statutes of West Virginia for such associations to furnish or supply the county assessors with the list or the names of such shareholders, and consequently, it being left to such shareholders to report their own ownership of said stock, it was not always reported.

However, in Kanawha County, at least, when so reported by the owners, the assessor allowed a deduction of at least 30% from the actual value for assessment purposes, in line with assessments of other personal property. (R. 50.)

Then the Supreme Court of Appeals, in 1938, in the case of *Charleston Federal Savings & Loan Association, et al.*, vs. *James, Tax Commissioner*, 120 W. Va. 781, 200 S. E. 845, reversed its older and former ruling, and held all building and loan associations were taxable under the same provisions as other corporations.

In 1939, the Legislature decided to remedy this, and added Section 14(a) to Section 14 of Article 3 of Chapter 11, which amendment is the principal statute here involved.

In substance, this new Section 14(a) provided for the *capital stock* of building and loan associations to be assessed "at its true and actual value," and since the capital stock of a building and loan association is actually the money the so-called stockholders or shareholders have deposited, this amounted to a tax on the true owners, which for convenience sake was collected from the building and loan association as a whole, instead of each one individually, as formerly.

On its face, the statute is perfectly fair and constitutional. However, its interpretation by the Tax Com-

missioner of West Virginia, the appellee herein, and that interpretation being forced upon the Assessor of Kanawha County, and such interpretation and enforcement having been upheld by the highest court in West Virginia, the Supreme Court of Appeals, it has become unstitutional, and an invasion of the rights of these appellants, which rights are protected not only by the Constitution of the United States, but by the Constitution of West Virginia.

Section 1 of that same Article 3 of Chapter 11 for many years had provided that "all property shall be assessed annually as of the first day of January at its true and actual value," so Section 14(a) was in conformity with it, but included the capital stock of building and loan associations within the meaning of "all property." But fixing the value for assessment purposes as "the true and actual value," was, because of Section 1, not new in West Virginia law.

Prior to 1941, the Assessor of Kanawha County, West Virginia, after ascertaining the true and actual value of all property within the provisions of Class I of the Tax Limitation Amendment (Const. of W. Va., Art. X, Sec. 1), allowed a minimum deduction of 30% or more therefrom, before fixing the values for assessment and taxation purposes. Such a 30% discount or deduction was allowed as a minimum to every taxpayer who had property in Class I, had been so allowed for many years, and after the passage of Section 14(a), was allowed all building and loan associations. (See testimony hereafter related.) The record discloses particularly, that in 1940 each of appellants was allowed such a discount by the Assessor. (R. 81, 94, 100, 110-111.)

For the year 1941, each of the four appellants again filed their tax returns with the Assessor and took the 30% deduction from the actual value, to arrive at the assess-

ment figure. (R. 49; see Wilkinson Ex. 2, R. 187, at 190, for Charleston Federal Savings & Loan Association; for First Federal Savings & Loan Association, R. 52, 94, and Wilkinson Ex. 4, R. 199, and at 205; for West Virginia Building & Loan Association, R. 110, and Watt Ex. No. 1, R. 241, at 247; for Empire Federal Savings & Loan Association, R. 117, 182-183.) The Assessor of Kanawha County accepted their returns with the 30% deduction, and again intended to allow it, to equalize these taxpayers with all others who owned property in the same classification, who were and are given this minimum deduction of 30%. (R. 50-51, 56, 73, 123.)

But the Tax Commissioner of the State of West Virginia, appellee herein, on June 4, 1941, wrote a letter to all of the tax assessors of the State of West Virginia, including the Assessor of Kanawha County (R. 159), which was introduced as Krueger Exhibit No. 1 (R. 276-278), in which he instructed the assessors, in effect, to discontinue this practice of allowing a 30% minimum discount or deduction, in calculating and determining the assessment of building and loan associations. Therefore, an assistant to the Tax Commissioner, for each of the four appellants, and over their objection, made out a revised return, and insisted that the Assessor of Kanawha County use the figures there arrived at as the valuations for assessment, which figures were made without any deduction of the 30% allowed to all other taxpayers whose property was in Class I. (These returns are Exhibit Wilkinson No. 1 [R. 185] for Charleston Federal Savings & Loan Association; Exhibit Wilkinson No. 3 [R. 194] for First Federal Savings & Loan Association; Wilkinson Exhibit No. 5 [R. 218] for West Virginia Building & Loan Association.)

The Assessor of Kanawha County, following the instructions of George P. Alderson, State Tax Commissioner, appellee herein, made a revised computation of

the capital stock of each of the appellants, and refused to allow them the 30% discount he had intended to allow, and had formerly allowed them, and all other similar taxpayers, and thereupon valued their property for assessment purposes as follows:

Charleston Federal Savings & Loan Association	$921,180.00
First Federal Savings & Loan Association	249,080.00
West Virginia Building & Loan Association	69,490.00
Empire Federal Savings & Loan Association	273,880.00

In accordance with pertinent statutes of the State of West Virginia, each of the appellants herein filed a petition and protest with the County Court of Kanawha County, ex officio Board of Review and Equalization of said County, a lay court, and hearings were had and testimony taken on said petitions and protests. That testimony is all incorporated in the record printed for use in the Supreme Court of Appeals of West Virginia, pages 47-184, inclusive, and the exhibits there introduced in evidence are in that printed record at pages 185-305, inclusive. At the end of that hearing, an opinion was rendered by the said County Court (R. 41-43, S. J. 26-29) and it was ordered that the assessed valuations of the properties of these four appellants be reduced to, fixed at, and placed on the property books of Kanawha County as of January 1, 1941, in the following amounts, respectively:

Charleston Federal Savings & Loan Association	$639,030.00
First Federal Savings & Loan Association	170,450.00
West Virginia Building & Loan Association	48,230.00
Empire Federal Savings & Loan Association	189,600.00

The testimony of the tax assessor of Kanawha County, and others, taken at the hearing before the County Court, will be later set forth, but the substance of the County Court's decision, with emphasis supplied, was that the valuations placed by the assessor, at the direction of the appellee herein, "are *in excess of the true and actual values of the respective properties* of the said four protestants, respectively, and that the assessed valuations aforesaid of the said properties of the said protestants are *at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are therefore discriminatory and not uniform and equal,*". (S. J. 27.)

On the 18th day of August, 1941, George P. Alderson, State Tax Commissioner, appeaied to the Circuit Court of Kanawha County, West Virginia, from the said order of the County Court, alleging (R. 27) that the assessor had correctly assessed the properties of these four appellants "for the purpose of taxation at their true and actual values in compliance with Section 14A, article 3, chapter 11, of the West Virginia Code * * * and further *in compliance with a written instruction* issued by the Tax Commissioner to all county assessors under date of June 24, 1941, relative to the assessment of the properties of all financial institutions operating in the State of West Virginia * * *."

On the 23rd day of December, 1941, the Circuit Court of Kanawha County rendered its opinion reversing the County Court of Kanawha County and reinstating the assessed values, as the Circuit Court said, "these being the amounts fixed and determined by the said Tax Commissioner and at his direction placed by the Assessor of Kanawha County, West Virginia, upon the property books for assessment purposes * * *." (S. J. 32.)

That Court further held, in part:

> "The burden of appellee's argument seems to be discrimination because of the fact that the Assessor of Kanawha County assesses other species of property in Class I upon a different basis. As I view it, such argument would be tenable only in the event there was a different assessment of other properties of a like character, in this instance building and loan associations. *The fact that live stock, personal property of other genus and real estate may be assessed upon a certain percentage of its estimated true and actual value, is not in my opinion discriminatory so long as all building and loan associations or institutions of like character are assessed upon a uniform basis.* (Emphasis supplied.)
>
> "The Courts have taken judicial notice of the long continued practice of assessors throughout the state to assess property, real and personal, at less than its true and actual value, varying in the different counties. If it be the policy of the state throughout its authorized officials to abandon this method of assessment and give literal application to the meaning of the terms 'true and actual value,' who is to gainsay them?" (S. J. 33.)

A statutory appeal under Chapter 11, Article 3, Section 25, Michie's Code of West Virginia, 1941, as amended by Chapter 41, Acts of the Legislature of West Virginia, 1943, from this final decree and order of the Circuit Court of Kanawha County, West Virginia, reversing the action of the County Court of Kanawha County, was taken to the Supreme Court of Appeals of West Virginia.

The Supreme Court of Appeals of West Virginia sustained the Circuit Court of Kanawha County upon the ground that the Legislature could subdivide any of the four classes set up in the Tax Limitation Amendment to

the Constitution and prescribe methods for valuing any class of property therein, so long as that valuation was made uniform throughout the State, and that there was nothing discriminatory or unconstitutional in so doing.

That Supreme Court of Appeals of West Virginia stated that these appellants relied upon the case of *West Penn Power Co.* v. *Board of Review and Equalization*, 112 W. Va. 442, 164 S. E. 682, decided in June, 1932, in which it was held that in a West Virginia county, where the property of one taxpayer was taxed at full value with a discount given to all other property owners in the county, that this was discriminatory and unconstitutional, and the assessed valuation of the property of the one taxpayer must be reduced by the same percentage allowed all other taxpayers in that county.

The Supreme Court of Appeals, in the instant case, stated that the West Penn decision was based largely on *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, which had been sustained by the Supreme Court of the United States by many other cases, among which were: *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Louisville & Nashville Ry. Co.* v. *Greene*, 244 U. S. 522; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Bohler* v. *Callaway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines National Bank* v. *Bennett*, 248 U. S. 239.

The Supreme Court of West Virginia went on to hold, in the instant case, that "the force and weight of these decisions, as applied to the present controversy, is largely, if not entirely, nullified by the recent decision of the same Court (Supreme Court of the United States) in *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254." Then the Supreme Court, in substance and effect, stated that if these taxpayers, the

appellants, were assessed and taxed at a higher proportional valuation than other taxpayers of the same class, the other taxpayers should be raised to the level of appellants, and appellants should not have their assessed valuations lowered to the level of other similar taxpayers.

Appellants, believing their federal rights infringed, and believing that the decision of the Supreme Court of Appeals of West Virginia sustaining the interpretation of Section 14(a) as made and enforced by the Tax Commissioner, makes Section 14(a) unconstitutional, after applying for and being denied a rehearing, applied to the Presiding Judge of the Supreme Court of Appeals of West Virginia for an appeal to this Court. After a careful consideration of the jurisdictional issues involved in the granting of the appeal, an order was entered by Presiding Judge Rose, allowing the appeal, and a "Memorandum" opinion was written and filed, sustaining the allowance of the appeal, and setting forth the reasons why it was believed by that Judge that the appeal was properly allowed. This opinion is printed as the Appendix to "Brief of Appellants in Opposition to Motion to Dismiss," at pages 13-20.

This Court on October 16, 1944, noted that "jurisdiction is reserved" as to this case.

QUESTION PRESENTED

Is not the statute of West Virginia unconstitutional in that its interpretation and enforcement by the Tax Commissioner, appellee, which interpretation and enforcement was sustained by the Supreme Court of Appeals of West Virginia, have violated the rights of appellants guaranteed by the United States Constitution, and by the Constitution of West Virginia, in that the property of all other similar taxpayers is admittedly assessed at a minimum discount of 30% of its true and actual value, which reduction or discount has been refused these appellants?

SUMMARY OF ARGUMENT

1. Appellants, taxpayers, were indisputedly and admittedly, purposefully and intentionally discriminated against in the assessment of their properties for tax purposes, in that all other similar taxpayers were and are given a minimum 30% deduction from the value of their properties when assessments are fixed, and that or any deduction, by order of the appellee, was refused to appellants.

2. When a state statute is interpreted and enforced by a state official so that it becomes discriminatory, and violative of the constitutional rights, both state and federal, of a citizen and taxpayer, and that interpretation and enforcement of that statute is sustained by the highest court of last resort of that state, then such statute is unconstitutional, and the federal constitutional rights of the taxpayer are infringed, entitling him to relief from this Court.

3. When a state tax statute, and its interpretation and enforcement by a state official is such as to require the property of a taxpayer to be assessed at its full value, when the property of all other similar taxpayers is assessed at less than full value, or reductions or discounts to such other taxpayers are made from full value before assessments are finally fixed; and when such discrimination violates the constitutional rights of the taxpayer, both state and federal, requiring uniformity and equality of taxation and treatment, this Court will correct such discrimination by ordering the assessments of the taxpayer who is discriminated against reduced to the level of all others, in conformity with the constitutional provisions, rather than ordering the assessment of all other taxpayers raised to the level of the one discriminated against, in accordance with the requirements of the statute.

ARGUMENT

Appellants' contentions, and their aggrievements, can be reduced to very simple propositions, in which contentions both the evidence adduced below and the law of the land support them. Therefore, the Supreme Court of West Virginia, below, was in error.

First, these appellants maintain that the evidence is undisputed that they were purposefully and intentionally discriminated against in the fixing of the values of their property for assessment, and therefore taxation, purposes.

There can be no doubt but that the Assessor of Kanawha County, West Virginia, allowed a minimum discount of 30% from the actual and real value of the personal property of all other taxpayers whose property is included within Class I of the Tax Limitation Amendment. (Incidentally, such a discount is likewise allowed the taxpayers whose property is embraced within the provisions of Classes II, III and IV, although that is not particularly pertinent to the instant case.

The reason we state so emphatically that such minimum deduction of 30% is and was allowed is *because the Assessor, under oath, so testified.* We set out immediately below the testimony of the Assessor and others, at some length, because we believe it is decisive of the case, and fully sustains appellants' contentions.

The testimony of the Assessor was taken by the appellants herein before the said County Court, and it was upon this testimony mainly, we presume, that the County Court based its findings of fact and its opinion. That

deputy assessor, Mr. Wilkinson, was in direct charge of all matters of assessment in Kanawha County, and testified that the returns as filed by the appellants herein, taking the 30% deductions, followed the same method that had been used by the building and loan associations in years previous to 1941 (R. 50).

When asked as to whether the method used by building and loan associations or the method used by the State Tax Commissioner's office was the proper method to be used in assessing the valuation of building and loan associations, the assessor testified in favor of the method used by the building and loan associations (R. 51).

> "A. I believe the return with the addition of the reserves less the 30% discount would be the more equitable assessment.
>
> "Q. Would that be in line with the assessments of other personal property in Kanawha County by allowing the 30% discount?
>
> "A. It would be, yes, sir."

Mr. Wilkinson further testified that the only reason he assessed the property of these associations at the present figure was because he received specific directions so to do from the State Tax Commissioner's office, and that he did not accept the valuations fixed by the Tax Commissioner's office because "I did not agree at first."

> "Q. Why did you later?
>
> "A. Because of the order by the Tax Commissioner's office, and I thought we had better probably do as he instructed." (R. 55.)

He further testified that the deduction of 30% with respect to the Charleston Federal Savings & Loan Association and its return, marked "Exhibit No. 2," was in accordance with the method used in Kanawha County in assessing intangible personal property. (R. 56.)

In stating how the various types of property in Class I were assessed, the witness stated the following method or plan was used:

> "Money is valued, of course, at 100%; accounts receivable are valued at about 70% unless they are installment accounts, and they are valued at approximately 65%.",

this being 65% of the book value shown on the face of them (R. 57).

He testified that live stock was valued at approximately 50% of the purchase price, which was ascertained by asking the farmer what he had paid for a plow or cattle or live stock, taking 50% of that value for assessment purposes (R. 57).

He further stated: "Notes are assessed at approximately 70%" (R. 57). Further that "Bonds are assessed at approximately 70% unless their market value is less. Then, of course, if the market value of bonds is less than 70% we generally factor them slightly under their market value."

Mr. Wilkinson testified that this 70% was of the face value of the bonds (R. 57-58), and later clarified this by stating he meant taxable bonds of private corporations, and that he assessed them at 70% of their market value (R. 144).

He testified that the above is the same system used throughout Kanawha County in all its magisterial districts, by all of the field deputies of the assessor, and under the instructions of the assessor of that county (R. 58).

With reference to Class II property, it is assessed, according to the witness, at approximately 50% to 60% of the construction cost of the building. The land values are determined by localities (R. 58-59). In some districts the *percentage* is very low, and in others fairly high (R. 59). The 50% to 60% percentage is of the cost or replacement value. That is the method that is used in arriving at the value (R. 59). Property used exclusively for residential purposes, in Kanawha County, is assessed at a percentage of its cost price, varying from 80% in some districts to 25% in other districts (R. 60).

In Classes III and IV, real estate assessed values are determined as above stated for Class II. Automobiles are assessed at approximately 30% less than the Blue Book value. Gas wells are allowed a one-third deduction; and merchandise, store goods and all equipment of business establishments are assessed at 60% of the book value or inventory (R. 62).

Household furniture is valued at a very low rate (R. 63).

Upon cross examination by the Attorney General, the Assessor of Kanawha County stated that he was familiar with the methods suggested by the Tax Commissioner for assessment of associations such as are appellants, and when directly asked if "that method does not produce an assessment of the true and actual value" (as required by the statute) stated, "I do not believe so" (R. 122), and gave his reasons.

When further asked by the Attorney General how he would assess the "*property*" of such associations, he answered: (R. 123) "Well, I would take the investment shares and investment account, figure their undivided profits and probably their reserve for contingency, and *allow 30% discount as an equalization factor to other classes of property and other properties in the same classification.*"

The Assessor further testified with regard to all assessors in West Virginia (R. 70-71):

> "Q. In those conferences have you discussed ways and means of arriving at the assessed valuation by fixing some percentage of the true and actual value of what the value might be if sold upon the market voluntarily?
>
> "A. Yes, sir.
>
> "Q. Will you state for the record the nature of these discussions as between the assessors upon that practice of using a percentage of market valuation upon a voluntary sale?
>
> "A. In assessing various classes of properties we have agreed several years ago to use certain percentages of the inventory values or cost values or the book values of certain properties. For instance, inventories, merchandise, stocks, fixtures, machinery and equipment, we agreed to assess at 60%, and various classes of notes from 65 to 80% of their value. In fact the instructions we had on the front of Form 3-C were used by the majority of the assessors until those instructions were taken off during the past year by the Tax Commissioner's office."
>
> * * * *
>
> "A. From discussions with other assessors I am of the opinion that the majority of the assess-

ments on all classes of property is less than the true and actual value." (R. 72.)

• • • •

"Q. If you had followed the method which you use in Kanawha County in arriving at the assessed valuation of the three protestants here, the Charleston Federal Savings & Loan Association, the First Federal Savings & Loan Association and the West Virginia Building & Loan Association, which you have related you used with respect to other personal property in Class I, and also taking the percentage valuation of other classes, if you had not received specific instructions from the State Tax Commissioner's office, and thereby arrived at a different figure of valuation for these three companies?

"A. I would have, yes, sir.

"Q. Would that valuation have been less than the valuation as fixed by the office of the State Tax Commissioner?

"A. It would have been, yes, sir.

"Q. Will you state what the percentage of that valuation would have been?

"A. It would have been approximately 30% less." (R. 73.)

For real estate, Mr. Wilkinson testified that they tried to value real estate at between 50% and 60% of its market value, and based this upon actual sale prices as ascertained from the revenue stamps attached to the deeds filed. (R. 115-116.)

He was further asked, on cross examination, if Section 14(a) provided anything about taking such a 30% discount, and stated that while the statute did not so provide, "However, the Constitution, under the new tax

limitation amendment, provides that no one class of property shall be assessed greater than any other class." (R. 123-124.)

He further stated, with reference to the 30% figure, "That is merely the figure of percentage we have used in trying to ascertain the actual value." (R. 124.)

On further cross examination, Mr. Wilkinson testified that in assessing different classes of property for various percentages of true and actual value, that they first attempted "to establish the cost price and then to establish our assessment value accordingly."

On further cross examination, he testified (R. 147) that the Tax Commissioner's office, both verbally and by written instructions, with reference to gas wells and oil wells, instructed the assessors to assess such properties at a percentage of their true and actual values.

With reference to the building and loan associations who have not filed returns but for whom the State Tax Commissioner had prepared returns, Mr. Wilkinson testified that he "had intended to use the sheets provided by the Tax Commissioner's office *with our usual 30% discount*" to figure their assessments. (R. 149.)

The employees of the Tax Commissioner's office themselves testified that in arriving at their valuations for assessment purposes, for small loan companies, that "no discounts were allowed from true and actual value," but when asked what discounts were allowed, stated: "The true and actual value as shown on those sheets was obtained by valuing the notes at 85 cents on the dollar or, as you term it, *discounting* the face value 15%." (R. 170.)

Since, admittedly, appellants did not receive this minimum 30% discount allowed all other similar taxpayers, we next must look to see if such discrimination was intentional and purposeful, and therefore unlawful.

Again, we contend this is conclusively proven. After the statute in question, Section 14(a), was enacted, at least in 1940, as shown by the record, the appellant taxpayers made their returns, and they were accepted by the Assessor, with the same minimum 30% discount taken and allowed, as was given all other similar taxpayers. (R. 50.)

And in 1941, these appellants again filed their returns claiming their 30% reduction. (See Exhibits.) And the Assessor of Kanawha County not only intended to allow it, but again under oath, testified they were entitled to it, and it was necessary to give it to them to equalize them with other similar taxpayers. (See testimony above.)

The only reason he did not allow it in fixing the final amounts for assessment purposes was because of a letter from the Tax Commissioner of West Virginia, appellee herein, ordering him not to do so (R. 55), and this was followed up by a filing of returns with the Assessor by the assistants to the Tax Commissioner, for these appellants, in which such deduction was not given. And only because of such orders, and for no other reason, did the Assessor fail to allow the appellants their minimum 30% deduction, and instead fixed the valuations for assessment in accordance with the returns of and computations by the Tax Commissioner. (R. 51.)

The Tax Commissioner, appellee herein, in his petition for appeal to the Circuit Court from the order of the County Court, stated that the properties of appellants were assessed "at their true and actual values in compliance with Section 14A, Article 3, Chapter 11, of the West Virginia Code, and also in compliance with other applicable provisions of Chapter 11 of the West Virginia Code, further *in compliance with a written instruction issued by the Tax Commissioner* to all county assessors under date of June 24, 1941. * * *" (R. 27.) And the

Circuit Court found and held that the assessments as made were determined by the appellee herein, "and at his direction" placed upon the property books. (S. J. 33.)

So, we submit, not only does the evidence conclusively prove the discrimination was purposeful and intentional, but in his pleadings in this case, the appellee has *admitted* that it was, and that he was the one who did it, or caused it to be done.

The County Court of Kanawha County, West Virginia, a lay court, who heard appellants' appeal from the assessments so fixed by order of the Tax Commissioner, and before whom the witnesses were produced, the evidence taken, and the testimony heard, granted appellants' petition, reversed the assessments made by the Tax Commissioner, and allowed the reductions requested, on the ground that the properties of appellants "are at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and therefore discriminatory and not uniform and equal. * * *". (S. J. 22.) This quotation is from the order entered by that lay court at the end of the hearing before them.

Thus, the County Court, the fact finding body, has actually found that the facts showed such purposeful discrimination. Therefore, we submit, there can be no question but that there is and was a discrimination against these appellant taxpayers, and that it was purposeful and intentional.

Next comes our second proposition: When a statute of a state which is fair and constitutional on its face, is so interpreted by a state official as to make it discriminatory and violative of the constitutional rights, both state and federal, of a taxpayer, and such interpretation and the enforcement thereof is sustained by the highest court of

last resort in the State, thereby making it the law of the State, then such statute becomes unconstitutional, is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and this Court will grant the necessary relief.

As this Court stated early in 1944, in the case of *Snowden* v. *Hughes*, --- U. S. ---, 88 L. Ed. Adv. Ops. 347:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, *cf. McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-4."

And Mr. Justice Frankfurter, in his concurring opinion in that case, further stated:

> "I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State, *certainly not until the highest court of the State confirms such action and thereby makes it the law of the State.*" (Emphasis supplied.)

Lastly, when a statute as interpreted and enforced by the highest court of a state, is intentionally discriminatory against a taxpayer, and thus directly conflicts with a state constitutional provision providing that taxation shall be "equal and uniform," and conflicts with the provisions of Section 1 of the Fourteenth Amendment pro-

viding for "equal protection of the laws," and forbidding the abridgement of "the privileges and immunities of citizens of the United States," then that statute, as interpreted and enforced, must yield to the constitutional provisions. And this Court has consistently held that in such event, when faced by such a dilemma, it being impractical to raise the assessments of all other taxpayers to comply with the statute, the taxpayer who is discriminated against must have his assessment reduced to the level of the other taxpayers, to comply with the constitutional provisions of uniformity.

We respectfully submit that the law, as decided by this Court in many cases, is plain. This Court has on numerous occasions cited below, held that where the state taxing officials fail to assess property for taxation on a uniform standard of valuation, as required by the assessment laws and constitutional provisions, and where such failure is due to a purposeful discrimination, it is unlawful and unconstitutional. We believe the latest pronouncement of this Court is found in *Snowden* v. *Hughes, et al.*, (*supra*), in which Mr. Chief Justice Stone, in rendering the majority opinion, stated, in part:

> "Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter* v. *Louisville & N. R. Co.*, 196 U. S.

599, 607, 609-10; *Chicago B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 526. Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long-continued. *Cf. McFarland* v. *American Sugar Co., supra.*"

Note by this Court:

"See also *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 36; *Sioux City Bridge Co.* v. *Dakota Co.*, 260 U. S. 441, 447; *Bohler* v. *Callaway*, 267 U. S. 479, 489; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 25, 28; *cf. Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 139."

The Supreme Court of Appeals of West Virginia, as we have above set forth herein, stated that the appellants strongly relied upon the case of *West Penn Power Co.* v. *Board of Review and Equalization*, 112 W. Va. 442, 164 S. E. 862. That case was decided mainly upon the reasoning of *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. Ed. 340, with the West Virginia Court reciting that the latter case held where a taxpayer's property is taxed at 100% of its true and actual value, it is his right to have his assessment reduced to the percentage of values at which other properties of the same class in the same governmental unit of the United States are taxed, "even though the statute requires that all property be taxed at its true and actual value." The Supreme Court of Appeals of West Virginia was correct in stating that the appellants relied upon the *West Penn* case and upon the decisions of the Supreme Court of the United States which were therein cited and relied upon by the Court.

The Supreme Court of Appeals of West Virginia, in substance, frowns now upon the decision in the *West Penn* case, and states directly in its opinion, that the cases of the United States Supreme Court relied upon therein are in substance overruled by *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Browning*, 310 U. S. 362, 84 L. Ed. 1254.

We respectfully submit that that case last cited does not overrule the former decisions of the Supreme Court of the United States upon the point in question.

As Mr. Justice Frankfurter carefully set out in the opinion:

> "All Tennesee property is subject to such a tax; but there are two schemes of procedure for making assessments, one for public service corporations and one for other taxpayers. As to ordinary property the task of valuation rests upon officials of the various counties. For public service corporations the assessments must be made by the Railroad and Public Utilities Commission, which is commanded to ascertain the 'actual cash value' of corporate property situated in Tennessee."

This same scheme of taxation applies in West Virginia, whereby the properties of public utilities are assessed for taxation by the Board of Public Works (see Article 6 of Chapter 11, Code of West Virginia, particularly Sec. 11), and other property is assessed by the assessors in each county (see Articles 3, 4 and 5 of Chapter 11, particularly Section 2 of Article 3). In the *Nashville* case the question there raised was whether there was discrimination by virtue of the taxation of the public utilities at one valuation by the board created for that purpose and taxation of properties by the county assessors at a lower valuation. It was there stated that this differentiation in valuation by the two different methods of taxation had continued

for more than forty years. The Court, through Mr. Justice Frankfurter, then stated:

> "It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. (Citing Raymond v. Chicago Union Traction Co.; Sunday Lake Iron Co. v. Wakefield; Sioux City Bridge Co. v. Dakota County; Bohler v. Callaway; Cumberland Coal Co. v. Board of Revision; Iowa-Des Moines Nat. Bank v. Bennett.) All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment."

Therefore, the problem presented in that case was entirely different from the problem in the instant case, and we respectfully contend that the Supreme Court of the United States itself distinctly held that they were not overruling those cases which we contend apply to the instant situation.

We further respectfully contend that our case is directly within the exception noted by Mr. Justice Frankfurter, in that the Constitution of West Virginia provides for certain taxpayers to be in Class I, and states that all taxation shall be equal and uniform, and that when a discrimination, uniform and systematic, is made against a taxpayer within that Class I in favor of other taxpayers within that class, that this is unlawful and unconstitu-

tional. Furthermore, in Section 1 of Article 5, of Chapter 11, under the heading "What Personal Property Taxable," the statute provides that "All personal property of person residing in this state * * * shall be entered in the personal property book, and *shall be subject to equal and uniform taxation* * * *."

It is further respectfully submitted that the Supreme Court of the United States, in *Snowden* v. *Hughes*, 12 U. S. L. W. 4144, hereinabove cited, specifically held, in the opinion by Mr. Chief Justice Stone, and in the concurring opinion by Mr. Justice Frankfurter, that the cases cited by the Supreme Court of Appeals of West Virginia, as being overruled, were specifically still in effect.

The Supreme Court of West Virginia apparently took the position, in its opinion, that if the constitutional provisions, both state and federal, requiring uniformity of taxation and a lack of discrimination between citizens and taxpayers, were in conflict with the statute requiring assessment at true and actual value of certain taxpayers' properties, that the proper way to determine assessments would be to raise the assessments of all of the taxpayers who were being given a lower assessment, instead of lowering the assessments of the taxpayers who were discriminated against.

This is an erroneous assumption by the Supreme Court of Appeals of West Virginia, and an erroneous declaration of the law, as decided by this Court.

We quote but two relevant parts of decisions from the Supreme Court of the United States, and for the purpose of brevity merely cite other decisions which are among the multitudinous decisions sustaining our contention.

In *Sioux City Bridge Co.* v. *Dakota County*, *supra*, the Supreme Court of the United States stated:

"This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska Supreme Court in this case upholds the violation of the 14th Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."

In the case of *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 61 L. Ed. 1280, syllabus 7 of that case states:

"The requirement of Ky. Const., Sec. 172, that all property 'shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale,' will not prevent injunctive relief against steps looking to the enforcement of certain state and local so-called franchise taxes, based upon an assessment of the intangible property of a public service corporation by the State Board of Valuation and Assessment at not more than its fair cash value, *where the local assessing officers charged with valuing other classes of property systematically undervalue such property*, since to apply to one class of property the standard of fair cash value, systematically departed from with respect to other classes of property, would frustrate the principal object of that section, which, in view of the provisions of Sec. 171 and 174, requiring uniformity of taxation in proportion to value, and an identical rate as between corporate and individual property, must be deemed to be equal taxation." (Italics supplied.)

In the *West Penn case* above cited, syllabus 2 thereof, which was law in West Virginia, holds:

> "Under the Fourteenth Amendment of the Constitution of the United States it is the right of a taxpayer whose property is taxed at one hundred per centum of its true and actual value to have his assessment reduced to the percentage of that value at which other properties of the same class in the same governmental unit of taxation are taxed, even though the statute requires that all property be taxed at its true and actual value."

In *Cummings* v. *Merchants' National Bank of Toledo*, 101 U. S. 157, 25 L. Ed. 903, Mr. Justice Miller stated:

> "Independently of this Statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

See also:

Raamond v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. Ed. 78;

Bohler v. *Callaway*, 267 U. S. 479, 69 L. Ed. 745;

Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23, 76 L. Ed. 146;

Booneville National Bank v. *Schlotzhauer* (Mo.), 298 S. W. 732, 55 A. L. R. 489;

Knox v. *Southern Paper Co.* (Miss.), 108 So. 288;

Randals v. *State* (Tex.), 15 S. W. (2d) 715;

Pacific Telephone Co. v. *W.* (Wash.), 34 P. (2d) 751;

Peninsula Power Co. v. *W. T. Co.* (Wis.), 218 N. W. 371;

People v. *G. T. W. R. Co.*, 357 Ill. 493, 192 N. E. 645;

3 A. L. R. 1317, Note;

28 A. L. R. 983, Note;

55 A. L. R. 503, Note.

Conclusion

We therefore respectfully submit that the decision of the Supreme Court of Appeals of West Virginia affirming the decision of the Circuit Court of Kanawha County, West Virginia, should be reversed, and that the finding and order of the County Court of Kanawha County, ex officio Board of Review and Equalization, should be reinstated.

Respectfully submitted,

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APPENDIX

Chapt. 11, Art. 3, Sec. 14(a):

"Assessment of Capital and Realty of Building and Loan Association, and Federal Savings and Loan Association.—The capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value, according to the rules prescribed by this chapter, to such building and loan association or federal savings and loan association in the county, district and town where such association is located: Provided, however, That such shares and such accounts held by the United States government or any of its agencies shall not be included in determining the assessment. The real and actual value of such capital, represented by the market value of such investment shares and investment accounts as aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain whether from any return made by such association to any officer of this state or the United States, from actual sales of such investment shares and investment accounts, from answers to questions by the assessor, as hereinafter provided, or from other trustworthy sources.

"The secretary or principal accounting officer of every such building and loan association and federal savings and loan association shall cause to be kept a complete record of all such investment shares and investment accounts, which shall be open to the inspection of the assessors of the counties, and the state tax commissioner or his assistants; and such secretary or officer shall an-

swer under oath such questions as the assessor may ask him concerning the matters shown by such records and accounts, and concerning the value of such investment shares and investment accounts, and shall be subject to the same penalties for failure to do so, which are imposed by law upon individuals failing to answer questions which the assessor is authorized to ask. The taxes levied and assessed upon the capital of every such building and loan association and federal savings and loan association, represented by the true and actual value of such investment shares and investment accounts as aforesaid, shall be paid by such association in the same manner and at the same time as other taxes are required to be paid in such county, district and town.

"The real estate of any such building and loan association or federal savings and loan association shall be assessed as in other cases, and a proportionate share of such assessed value shall be deducted in ascertaining the market value of such investment shares and investment accounts, but in ascertaining the true and actual value of such capital as represented by such investment shares and investment accounts as aforesaid, the assessor shall take into consideration all earned reserves and undivided profits of any such association. And if the title to the building in which any such association does its business and the land on which such building stands is held by a separate corporation, in which any such association alone or together with another such association or bank company or companies own stock, and such building and land be assessed in such separate corporation, a proportionate share of the assessed value of such real estate of such separate company shall be deducted in ascertaining the market value of the investment shares and investment accounts of such association. Every such association shall make a

return to the assessor as of the first day of the assessment year."

Chap. 11, Art. 3, Sec. 1:

"Time and Basis of Assessments; True and Actual Value; Default; Reassessment; Special Assessors.—All property shall be assessed annually as of the first day of January at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented. The taxes upon all property shall be paid by those who are the owners thereof on that day, whether it be assessed to them or others. If at any time after the beginning of the assessment year, it be ascertained by the tax commissioner that the assessor, or any of his deputies, is not complying with this provision or that he has failed, neglected or refused, or is failing, neglecting or refusing after five days' notice to list and assess all property therein at its true and actual value, the tax commissioner may order and direct a reassessment of any or all of the property in any county, district or municipality, where any assessor, or deputy, fails, neglects or refuses to assess the property in the manner herein provided. And, for the purpose of making such assessment

and correction of values, the tax commissioner may appoint one or more special assessors, as necessity may require, to make such assessment in any such county, and any such special assessor or assessors, as the case may be, shall have all the power and authority now vested by law in assessors, and the work of such special assessor or assessors shall be accepted and treated for all purposes by the county boards of review and equalization and the levying bodies, subject to any revisions of value on appeal, as the true and lawful assessment of that year as to all property valued by him or them. The tax commissioner shall, with the approval of the board of public works, fix the compensation of all such special assessors as may be designated by him, which, together with their actual expenses, shall be paid out of the county fund by the county court of the county in which any such assessment is ordered, upon the receipt of a certificate of the tax commissioner filed with the clerk of the court showing the amounts due and to whom payable, after such expenses have been audited by the county court.

"Any assessor who knowingly fails, neglects or refuses to assess all the property of his county, as herein provided, shall be guilty of malfeasance in office, and upon conviction thereof, he shall be fined not less than one hundred nor more than five hundred dollars, or imprisoned in the county jail not less than three nor more than six months or both, in the discretion of the court, and upon conviction, he shall be removed from office."

Const. of West Virginia, Art. X, Sec. 1:

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species

of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipalities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined while

owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the state tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing."

Sec. 1 of the 14th Amendment to the Const. of the U. S.:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."